NO. 47927-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

CURTIS WALTER HORTON,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

1. **The trial court did not err by ruling that Defendant had no privacy interest in tire ruts in a campsite and a wrecked Jeep parked in an open field near land Defendant was camping upon.**

2. **The trial court did not err in denying to suppress evidence obtained as a result of observing license plates of RVs parked out of doors in an open field.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The State charged Defendant with Vehicular Assault. Defendant moved to suppress evidence pursuant to CrR 3.6, claiming "Illegal entry and illegal detention and arrest." Clerk's Papers at 15. Defendant's motion asserted that the officers' entry onto private property was illegal, and therefore all evidence stemming from that entry should be suppressed. CP at 20.

At the time of the hearing the court determined the facts relevant to the CrR 3.6 issue were not substantively at issue, the facts provided by both parties in the motion and reply being similar. Verbatim Report of Proceedings at 6. The parties agreed that the facts were not substantially contested. VRP at 7-8. The facts from the State's brief are as follows:

On August 30, 2013, police were dispatched to a one car rollover collision which occurred on the beach in the vicinity of Moclips. The

reporting party advised the vehicle had been doing "wheelies" prior to rolling over. Trooper Blake with the Washington State Patrol, Deputy Russell with the Grays Harbor Sheriff's Office, and Park Rangers Fernandez and Staab responded. The park ranger arrived first, but after an ambulance had arrived. Trooper Blake arrived on scene 10 minutes to midnight and observed aid personnel strapping a male to a back board. Deputy Russell advised that the male was the passenger, and the vehicle had fled the scene. The passenger was identified as Michael Walls. Walls' right leg was bloody and had been wrapped with gauze. He denied driving.

Ranger Staab left the scene in an attempt to find the involved vehicle. Dispatch advised that the Jeep might be involved with the trailer park near the "High Tide" condos in Moclips, but there seemed to be no matching vehicles there. Ranger Staab then drove down a gravel road to a grassy area filled with motorhomes and three Jeeps. The other officers responded to help. Two of the Jeeps were still warm to the touch and sand was located on the tires and inner fender wells. The owners of the vehicles appeared to be highly intoxicated and were uncooperative, refusing to give information.

Trooper Blake and Deputy Russell returned to the scene of the collision. Deputy Russell pointed out to Blake that there was an impression of the side walls of tires in the sand, apparently from when the vehicle Walls had been riding in tipped over. From the imprint of the sand, the maker of the tire was "Super Swamper." Trooper Blake also noted the dimensions of the tires.

Meanwhile, back at the camp ground, Ranger Staab had found an aggressive set of tire tracks and followed them to a Jeep around the back of the RV Park, down a dirt road, and through approximately 50 yards of dense brush. It had significant damage to the hood, roof and window frame, indicative of being in a rollover collision. Trooper Blake returned and discovered there was blood located throughout the vehicle, and no keys in the ignition of the Jeep. The tires were "Super Swamper" tires with the same dimensions as those found in the imprints in the sand. The Jeep was registered to Curtis W. Horton, hereinafter the defendant. Officers began running the registration of the RVs parked in the RV Park and found one registered to Curtis Horton. Trooper Blake went to the front of the RV and shined his flashlight in the window to see a person asleep. He knocked on the RVs door and eventually an obviously

intoxicated man opened the door. His clothes were covered in blood and Trooper Blake observed sand in his ears.

Trooper Blake asked the man if he were Curtis Horton and Defendant said he was. Trooper Blake asked for ID and Defendant gave Trooper Blake his wallet which contained a driver's license. Trooper Blake asked Defendant if he owned a green Jeep and Defendant said, "Yes." Trooper Blake asked if he knew where his Jeep was and Defendant replied, "Over there," and pointed towards nothing. Defendant claimed the blood covering his clothes was barbeque sauce and that he did not know how the sand got in his ears. He removed the keys to his Jeep from his pocket and set them on the step of the RV. Defendant did not seem to care that an injured man had been left on the beach or that his Jeep was not where he claimed it to be.

Trooper Blake arrested Defendant for Vehicular Assault and took him to jail. Defendant stopped answering questions. The Jeep and Defendant's clothes were seized.

Months later Detective Joi Haner of the State Patrol obtained a sample of Michael Walls' DNA by a search warrant. The State Patrol crime lab analyzed the sample and compared it to the bloodstains on Defendant's seized clothing and obtained a match. The estimated

probability of selecting an unrelated individual at random from the U.S. population with a matching profile is 1 in 190 quintillion. Detective Haner, after reviewing walls' medical records, opined that the Jeep rolled over, and when it was upside down part of the roll cage became detached and penetrated Michael Walls' calf, causing blood to drip down into the Jeep and onto the driver as the Jeep came to rest on the driver's side.

According to Defendant's motion the Jeep was located,

> ...approximately 80 yards off the roadway when accessed through the campsite, and about 25 years from the nearest road running parallel to where the Jeep was parked. A later investigation showed that the Jeep was also parked about 88 feet in back of the last permanent building on the campsite.

CP at 17. Defendant described the gathering of people as "approximately 20 Jeep enthusiasts camping on a parcel of private property..." CP at 16.

At the hearing Defendant conceded that the ownership of the property that the officers entered on to, although private, was unknown. VRP at 16. Defendant conceded that it was unknown if Defendant had a right to park his Jeep where it was found. VRP at 21.

Defendant submitted an aerial photograph of the property in question attached to his motion. CP at 36. At the hearing a larger, color version of this photograph was admitted (albeit without scale.) VRP at 15; Exhibit 1. From the photograph the property that is an RV park appears to

run along 6th Street in Moclips, and is not separated from 6th Street by a fence. CP at 36, Exhibit 1. The property appears to be open land with perhaps one or two structure. See *Id.*

Pursuant to CrR 3.6(a) the court found that no evidentiary hearing was necessary. VRP at 6, Cp at 67. The court denied the motion to suppress. VRP at 25, CP at 66.

ARGUMENT

Summary of argument.

Police officers went to an open piece of land variously described as an RV park or campground in search for a vehicle that had been involved in a injury causing rollover. There is nothing to suggest that this property was not impliedly open. People were awake on the property, which contained RVs and a few Jeeps. While at the campground speaking with the people Ranger Staab found some tire tracks. Because officers are allowed to enter private property, like any citizen, the tire tracks were in open view.

The Jeep was ultimately found some distance away, obscured by darkness and parked in some bushes. It is not known upon whose property the Jeep was found, or if Defendant had permission to park it there. There

is nothing to suggest that this land was anything but an open field adjacent to the campground, or that Defendant held a privacy interest in this area.

The officers then ran the license plate of the Jeep to discover Defendant was the registered owner. If the Jeep was in open view, so was its license plate. It is long-established that there is no privacy interest in DOL records. The officers then ran the license plates of the RVs, which were also in open view, being in the same campground as they had found the tire ruts.

Standard of review.

Appellate courts review a denial of a motion to suppress *de novo*. *State v. Aase*, 121 Wn. App. 558, 564, 89 P.3d 721, 724 (2004) (citing *State v. Mendez*, 137 Wash.2d 208, 214, 970 P.2d 722 (1999).) Findings of fact are reviewed for substantial evidence. *Id.*

Article 1, section 7 privacy.

"It is well established that article I, section 7 of the Washington Constitution qualitatively differs from, and in some areas provides greater protections than, the Fourth Amendment." *State v. Hathaway*, 161 Wn. App. 634, 642, 251 P.3d 253, 258 (2011) (citing *State v. Puapuaga*, 164 Wash.2d 515, 521-22, 192 P.3d 360 (2008) and *State v. McKinney*, 148 Wash.2d 20, 26, 60 P.3d 46 (2002).) However, "[t]he relevant question is

whether article I, section 7 affords enhanced protection in this particular context." *Id.* (citing *McKinney*.)

"Interpreting and applying article I, section 7 requires a two-part analysis." *Id.* (citing *Puapuaga*.) "The first step requires determining whether the State 'unreasonably intruded into a person's private affairs'." *Id.* (quoting *State v. Cheatam*, 150 Wash.2d 626, 641–42, 81 P.3d 830 (2003) (internal quotation marks omitted). "Private affairs are those that reveal intimate or discrete details of a person's life." *Id.* (citing *State v. Jorden*, 160 Wash.2d 121, 126, 156 P.3d 893 (2007).) "The protections of article I, section 7 are triggered only when a person's private affairs are disturbed or the person's home invaded." *State v. Carter*, 151 Wn.2d 118, 126, 85 P.3d 887, 890-91 (2004) (citing *City of Seattle v. McCready*, 123 Wash.2d 260, 270, 868 P.2d 134 (1994).)

In the instant case Defendant apparently drove his wrecked Jeep into an RV park containing many people. Defendant then drove it 50 yards into some bushes with enough force to leave what Ranger Staab described as "aggressive tire tracks." Far from being "private," "intimate" or "discrete," the evidence suggests these activities were committed in public, since the other campers were awake when the officers arrived. The

incident is not made private by the absence of the officers at the time the Jeep arrived.

The tire tracks and Jeep were not "private affairs," but public, and probably somewhat noisy. Defendant should not be afforded the greater protections of article 1, section 7.

Fourth Amendment privacy standard.

It has been established that a guest may have a privacy interest under the Fourth Amendment to the U.S. Constitution. See *State v. Jones*, 68 Wn. App. 843, 850-51, 845 P.2d 1358, 1360 (1993). However, "Fourth Amendment rights are 'personal rights' that may not be vicariously asserted." *Jones* at 847 (citing *State v. Foulkes*, 63 Wash.App. 643, 647, 821 P.2d 77 (1991).) "Thus, to establish a Fourth Amendment violation, one must demonstrate a personal and legitimate expectation of privacy in the area searched or property seized." *Id.* "Without such a showing, a criminal defendant cannot benefit from the exclusionary rule's protections because one cannot invoke the Fourth Amendment rights of others." *Id.* (citing *U.S. v. Salvucci*, 448 U.S. 83, 86–87, 100 S.Ct. 2547, 2550–2551, 65 L.Ed.2d 619 (1980).)

"[A] defendant seeking to suppress evidence on Fourth Amendment grounds 'must in every instance first establish that he had a

legitimate expectation of privacy in the place where the allegedly unlawful search occurred.'" *Id.* (quoting *U.S. v. Freitas*, 716 F.2d 1216, 1220 (9th Cir.1983).) "[C]ourts have repeatedly rejected the 'legitimately on the premises' rationale as a sufficient gauge for measurement of Fourth Amendment rights." *Jones* at 849 (citing *Rakas v. Illinois*, 439 U.S. 128, 142, 99 S.Ct. 421, 429, 58 L.Ed.2d 387 (1978).)

"Fourth Amendment protections do not extend to open fields and no legitimate privacy interest is recognized unless the area immediately surrounding the home is involved." *State v. Crandall*, 39 Wn. App. 849, 852, 697 P.2d 250, 253 (1985) (citing *Oliver v. U.S.*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984).)

The Open View exception.

"In the 'open view' situation... the observation takes place from a non-intrusive vantage point." *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44, 47 (1981) (quoting *State v. Kaaheena*, 59 Haw. 23, 28-29, 575 P.2d 462, 466-67 (1978).) "No search occurs, and the protections of article I, section 7 are not implicated, when a law enforcement officer is able to detect something by using one or more of his senses while lawfully present at a vantage point." *Carter* at 126 (citing *State v. Cardenas*, 146

Wash.2d 400, 408, 47 P.3d 127, 131, *corrected*, 57 P.3d 1156 (Wash. 2002).)

> The presence of an officer within the curtilage of a residence does not automatically amount to an unconstitutional invasion of privacy. Rather, it must be determined under the facts of each case just how private the particular observation point actually was. It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house. In so doing they are free to keep their eyes open. An officer is permitted the same license to intrude as a reasonably respectful citizen. However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.

Seagull at 902-03 (footnotes and citations omitted.)

The RV park was impliedly open because the campers were awake and there was nothing to ward off visitors.

The officers did enter private property in search of evidence related to the wreck on the beach. However, police are not forbidden to enter private property. Rather, "police with legitimate business may enter areas of the curtilage which are impliedly open…" *Seagull* at 902. "An officer is permitted the same license to intrude as a reasonably respectful citizen." *Id.* (citing *U.S. v. Vilhotti*, 323 F.Supp. 425 (S.D.N.Y. 1972).) The officers in the instant case were investigating an injury-causing motor

vehicle crash, which is legitimate business. See generally *Seagull* at 903, n 1.

There is no indication that the officers went through any gates or passed any "No Trespassing" signs. There were three Jeeps and several motorhomes parked about in this campground, which by all indications is an open field. The officers arrived sometime around midnight; however, people were awake and about. There is no indication that the officers were asked to leave, and, in fact the first person they spoke to, at the entrance of the property, directed them inwards to a group. Far from intruding into someone's home, or even entering the curtilage of a residence, the officers in the instant case entered an open field that was being used for camping during hours in which the occupants were awake.

Ranger Staab stayed behind while the other officers went back to the beach. He found the aggressive tire tracks which eventually led him to the wrecked Jeep. Contrary to Defendant's assertion that Ranger Staab was now venturing outside an area that is impliedly open, the tire ruts were obviously in a place that a guest on the property found it appropriate to drive, as this is what Defendant had apparently done.

Ranger Staab then followed the ruts to discover the Jeep stashed in some bushes, and called Trooper Blake to come look. Because it was

dark, the officers used their flashlights. "The use of a flashlight has been upheld under the open view theory in a number of contexts." *State v. Rose*, 128 Wn.2d 388, 397, 909 P.2d 280, 285 (1996).

The location of the Jeep in relation to the RV park is not entirely clear, however the officers later said that the Jeep could be seen from the road. There is no indication that the Jeep was in any area which has previously been held to be a constitutionally protected area. It was not close to Defendant's RV, it was not in a garage or even under a tarp. The evidence is that it was simply concealed by darkness on someone's land near a campground that Defendant, along with many other people, were camping upon.

The presence of the other campers helps demonstrate the lack of privacy in the area in question. Any one of the campers could have stumbled upon the tire tracks or the Jeep. Defendant's argument really is that the place he parked his Jeep should have been private *from the police*.

Police officers are not forbidden to enter upon private property, as Defendant asserted in his motion. In the instant case the campground was an open field with people awake and about. There was nothing to ward off visitors, whether those visitors had badges or not. The area was impliedly open. This court should uphold the trial court's decision.

Guests on private property *can* have a privacy expectation; however Defendant made no showing of such an expectation.

It is undisputed that overnight guests *in a residence* can have an expectation of privacy. See *Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990) (finding overnight guest at a duplex, who possessed a key, had a reasonable expectation of privacy) and *State v. Link*, 136 Wn. App. 685, 693, 150 P.3d 610, 615 (2007) (holding four-part test to determine if guest in a house had standing to challenge warrantless search.) However, no case establishes that an overnight guest upon a campground has a privacy interest in a vehicle he has parked nearby.

Defendant cites to *U.S. v. Sandoval* for support of his position that a camper has a privacy interest in the surrounding campground. However, the *Sandoval* decision found an expectation of privacy *inside* a tent, not in the surrounding campground. See *Sandoval*, 200 F.3d 659, 660 (9th Cir. 2000).

Sandoval was expressly based on *U.S. v. Gooch*, 6 F.3d 673, 677 (9th Cir.1993)[1],which also found a privacy interest inside a camper's tent. However, a later case, *U.S. v. Basher,* specifically delineated the

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[1] "In *LaDuke v. Nelson*... we held that a person can have an objectively reasonable expectation of privacy in a tent on private property. In *Gooch*... we extended that holding to find a reasonable expectation of privacy in a tent on a public campground." *U.S. v. Sandoval*, 200 F.3d 659, 660 (9th Cir. 2000) (internal citations omitted).

distinction between the interior of a tent and the surrounding campsite, and found no privacy interest in the campsite. The *Basher* court held that,

> Classifying the area outside of a tent in a National Park or National Forest lands campsite as curtilage would be very problematic. A tent is comparable to a house, apartment, or hotel room because it is a private area where people sleep and change clothing. See *Gooch*, 6 F.3d at 677. However, campsites, such as the dispersed, ill-defined site here, are open to the public and exposed.

U.S. v. Basher, 629 F.3d 1161, 1169 (9th Cir. 2011).

As *Basher* notes, the inside of a tent (or, in this case, an RV) is essentially a moveable private area, where the campsite itself is there for anyone to observe.

In contrast, Defendant's argument seems to be that whatever land he parks his RV upon becomes a private area. No case holds as much, and, as the *Basher* court points out, such an argument is problematic.

Defendant also points to the unpublished case *State v. Jones*, 101 Wash.App. 1036 (2000) for support. However, "[a] party may not cite as an authority an unpublished opinion of the Court of Appeals." GR 14.1(a). *Jones* has no precedential value. See *State v. Nysta*, 168 Wn. App. 30, 44, 275 P.3d 1162, 1170 (2012), *as amended* (May 31, 2012). This court should disregard this portion of the argument.

Defendant has no privacy interest in the license plates of his vehicles which are parked in an open field.

Defendant next assigns error to the trial court's decision that the license plates of the RVs parked in the campground were in open view. They also contest the finding that the license plate on Defendant's wrecked Jeep was not a search, but this is essentially the same issue as locating the Jeep in the bushes.

The Washington Supreme Court has held that there is no privacy interest in DOL records. *State v. McKinney*, 148 Wn.2d 20, 32, 60 P.3d 46, 52 (2002). *McKinney* dealt with three joined cases in which police officers checked DOL records to learn the identities of the registered owners of vehicles. *Id.* at 24-25. One vehicle, McKinney's, was parked in the parking lot of a market at 3:40 a.m.. *Id.* at 24. One was a Chevy Nova and Chevy Truck parked in the parking lot of a motel, and the records check revealed the owners were the subjects of an active protection order. *Id.* at 25.

Despite one of the checks in *McKinney* being during the hours of darkness and another involving vehicles belonging to people who were apparently legitimate overnight guests on private property, Defendant attempts to differentiate the instant case because Defendant apparently

attempted to conceal his vehicle in some bushes and the police used flashlights. Defendant fails to articulate a substantive difference.

License plates are primarily for government purposes, including law enforcement, as *McKinney* makes clear. Defendant cannot make his license plate private by parking it in some brush. Such a holding would allow criminals to take affirmative steps to foil the lawful authority of the police.

It is telling that Defendant chose not to challenge Trooper Blake's use of a flashlight to peer inside his RV. Clearly, this is more intrusive than looking at his license plates. But it is also clearly legal.

Defendant had no privacy interest in his license plates. This court should uphold the decision denying the motion to suppress.

CONCLUSION

The open view exception to the warrant requirement says that no search occurs when police officers observe something while at a lawful vantage point. In the instant case the police went to an RV park which abuts 6th Street in Moclips. The property is essentially an open field on which RVs and vehicles are parked. Nothing prevents police officers from entering upon private property. Just as a private citizen searching for, say,

a lost dog or Frisbee, police may intrude to a reasonable degree, and there is no evidence the officers entered into anything but a common area.

While there one of the officers discovered some tire tracks and followed them to discover Defendant's wrecked Jeep. It is unknown whose property the Jeep was upon at the time, or if Defendant was entitled to park there. The Jeep was essentially in an open field, and partially visible from the roadway. Even the owner of an open field has no privacy interest in such an area, and all the evidence simply suggests Defendant was lawfully sleeping in his RV nearby.

The officers then viewed the license plate of the Jeep and then the RVs. Again, there is no evidence that the officers were not at a legal vantage point when they read the plates, in which there is no privacy interest. Like the tire tracks and the wrecked Jeep these items were in open view to the police, as well as any of the other 20 people carousing at this RV park.

There is no reason Defendant should be afforded a privacy interest in this RV park or the surrounding areas, except that Defendant apparently wanted his Jeep to remain hidden from the police by the brush and darkness. This does not amount to a legally cognizable privacy interest. The holding of the trial court should be upheld.

DATED this 1st day of April, 2016.

Respectfully Submitted,

BY: s/ Jason F. Walker
JASON F. WALKER
Chief Criminal Deputy
WSBA # 44358

/jw

GRAYS HARBOR COUNTY PROSECUTOR

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